

IRBs Added to Proposed FAHC Contract Amendment

Following feedback from a number of sources, language has been added to the proposed amendment to the Fletcher Allen Health Care contract for psychiatric services at Vermont State Hospital (See Update, July 1). The addition makes it clear that any research proposal must be approved by each party's institutional review board.

Here's the new language: "Any research proposal must be approved by the Contractor's Institutional Review Board, the Agency of Human Services Institutional Review Board, and the Commissioner of Health."

The words "experimental" and "investigational" also have been removed.

Here's the proposed amendment with the change (this is substitute language for the current section titled "Experimental/Investigative Care"):

Academic Involvement

As an academic institution, Contractor is expected to provide ongoing educational support and inservice training for psychiatric staff at the facility, providing academic exposure to the latest research and clinical developments.

Any research proposal developed by Contractor that involves VSH patients must be consistent with the State's goals of providing safe and appropriate care that is community-based, non-coercive and consumer-driven. Any research proposal must be approved by the Contractor's Institutional Review Board, the Agency of Human Services Institutional Review Board, and the Commissioner of Health.

The parties will not approve any research involving direct treatment of VSH patients unless and until, after consultation with appropriate stakeholders, including the VSH Governing Body and the State Adult Mental Health Program Standing Committee, comprehensive policies and procedures are in place governing the review, oversight and monitoring of such studies, including policies pertaining specifically to informed consent in involuntary settings.

Both the Adult Standing Committee and the VSH Governing Body will have additional opportunity to discuss this proposed substitute language at their August meetings. In the meantime, both parties to the contract have agreed that no research will be authorized by the language in the section of the contract currently titled "Experimental/Investigative Care."

Transportation and Restraint

Paul Blake, deputy commissioner of health for mental health services, met this week with 12 county sheriffs at the Vermont Police Academy in Pittsford to discuss transportation and restraint issues and will continue the discussion next week with officials from the Department for Children and Families, focusing on the transportation of minors. The Agency of Human Services' current transportation contract with the sheriffs' departments, which was to expire on June 30, has been extended for several months to allow further discussions about new contract language. Legislation passed in 2004 specifies that involuntary mental health transportation protocols must be designed to avoid trauma, respect privacy, and ensure safety, using the least restrictive means necessary. Under the new contract, the details of which are still being worked out, the Department of Health expects to pay for some of the necessary training and for non-metal restraints.

Role of the Governing Body To Be Discussed

In response to recent questions, a discussion of the role of the Vermont State Hospital Governing Body will be on the agenda for the group's next meeting, August 17. The matter is somewhat complicated because the authority delegated to the Governing Body is limited and does not include, for example, budgeting, appointment authority for state employees, or litigation. The limits of the delegated authority, however, are not fully articulated, which has led to some confusion. Because some Governing Body members are senior managers in state government, they often are briefed about and involved in decisions about matters that don't reach other members of the Governing Body. The goal of the August 17 discussion will be to clarify some of these issues.

Department of Justice Discussions Start Next Month

On July 5, the federal Department of Justice (DOJ) sent Governor Douglas a letter detailing the findings of its investigation last August at Vermont State Hospital. The Civil Rights of Institutionalized Persons Act ("CRIPA") empowers the DOJ to institute a lawsuit against Vermont to correct any alleged deficiencies on 49 days notice. Notwithstanding the power to file suit, the DOJ invited the State to resolve the matter on a cooperative basis. The DOJ asked that the State quickly notify it in writing of the State's intention to cooperate. On July 25, the State responded to the DOJ by letter, confirming its intention to cooperate and to seek a resolution. A copy of that letter is posted on the Mental Health Update web page. No further written response by the State is required.

The next step will be for the State to meet with the DOJ attorneys and their psychiatric expert. The Attorney General's Office (AGO) will take the lead for Vermont, and discussions are scheduled to begin in late September. It is the intention of the DOJ that the parties reach substantial agreement during this initial meeting, which will take place over the course of three days. Following this meeting, either the DOJ or the AGO will write up a draft Memorandum of Agreement. It is expected that it will take some time to finalize the document, ensuring that it accurately details the agreement entered into during the discussions. In the event that some areas remain unresolved following the September meetings, further discussions between the parties will be scheduled. In the unforeseen circumstance that the parties cannot reach agreement, the DOJ retains the ability to file suit.

As is usually the case involving negotiations in an adversarial legal proceeding, the State's goal of achieving a favorable outcome, either through negotiation or litigation, requires that it exercise its right to maintain the confidentiality of materials directly involved in the case. The attorney-client privilege protects from disclosure confidential communications between the client, in this case senior management, and the attorneys representing them. Although the client could theoretically waive this privilege, such a waiver would not be prudent in the face of litigation and even a partial waiver could jeopardize the case, since courts routinely find that any attempt by a client to engage in partial waiver of the attorney-client privilege constitutes a waiver of the privilege entirely.

Members of the State Adult Mental Health Program Standing Committee and of the VSH Governing Body have expressed interest in participating in the resolution of the DOJ investigation. However, as the State of Vermont is the potential defendant in any litigation, the public members of these bodies are not the "client" within the meaning of the attorney-client privilege. Disclosure of privileged information to these individuals would render the information no longer confidential, resulting in a potential waiver of the attorney-client privilege and attorney work product doctrines with respect to the entire subject of the DOJ investigation. This would seriously undermine the ability of the AGO to obtain an advantageous resolution of the matter.

Both the AGO and VDH are committed to informing the Standing Committee and Governing Body of the status of this important process and will seek relevant input at the August and September meetings on the issues raised by the DOJ findings. As soon as documents related to the case become final, and no longer protected by attorney-client privilege, they will be made public.

VSH Policies

Draft revisions of a number of Vermont State Hospital policies are posted on the web on the Mental Health Update page. On-line comment is requested.

VSH Census

The Vermont State Hospital census was 46 as of midnight Thursday night. The average census for the past 45 days was slightly more than 48.

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